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IN RE DZIYAUDDIN BAHAROM,
EX P; BANK MUALAMAT MALAYSIA BHD
HIGH COURT MALAYA, PULAU PINANG
WONG TECK MENG JC
[BANKRUPTCY NO: 29-1839-07-2013]
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2 MARCH 2015

***BANKRUPTCY:** Notice – Setting aside – Application for – Failure to exhibit judgment recorded in bankruptcy notice – Whether defective and wrong in law*

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***CIVIL PROCEDURE:** Summary judgment – Leave – Leave given in summary judgment order – Whether order was final judgment and enforceable – Whether order gave leave to plaintiff to enter summary judgment – Whether principal matter in question determined in summary judgment order*

D The present appeal stemmed from the Senior Assistant Registrar's decision in dismissing the summons-in-chambers application by the judgment debtor ('JD'). The JD had applied for a bankruptcy notice filed by the judgment creditor ('JC') to be set aside on the ground that it was defective and wrong in law as the JC failed to exhibit a judgment that was recorded against the JD. The request for issue of bankruptcy notice was based on a faired order of the High Court allowing the plaintiff to enter summary judgment under O. 14 of the Rules of Court 2012 ('ROC') against the defendant (JD) for a sum of RM620,620.92. The issue that arose for the court's adjudication was whether summary judgment order ('SJO') where leave was given for the plaintiff to enter summary judgment against the defendant was a final judgment against the judgment and was enforceable by the JC. The JD submitted that the SJO was not a final order but merely an order giving leave to the plaintiff to enter summary judgment against the JD and as such, the request for issue of bankruptcy notice which relied on the SJO and the issuance of the bankruptcy notice was defective and not in order and was yet to be set aside by the court. Relying on s. 3(1)(i) of the Bankruptcy Act 1967 ('the Act'), the JD argued that the JC was not a creditor envisaged under the said section in view of the unenforceability of the SJO, thus the JC had no right to commence bankruptcy proceedings against the JD. On the other hand, the JC argued that the SJO was a final order which the bankruptcy notice was premised upon since it had determined the principal matter in question which was that the JD was owing to the JC the sum stated in the SJO.
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Held (dismissing appeal with costs):

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(1) By O. 14 r. 3(1) of the ROC, the SJO reflected the order for judgment given by the court against the defendant and not the leave to enter summary judgment against the defendant. Hence, the summary order was a judgment in itself even though it was faired as an order and not

as a judgment in form. Be that as it may, the SJO came within the ambit of a final judgment or final order as envisaged under s. 3(1)(i) of the Act as it was a judgment that determined the principle matter in question. (paras 15 & 16)

(2) The strength of the SJO as a final judgment or order was conclusive and beyond dispute, as there was finality in the said order which had set out clearly the exact amount owed by the JD to the JC which the bankruptcy notice was premised upon. (para 22)

(3) Coming within the ambit of s. 3(1)(i) of the Act and there being no stay of execution of the judgment order, the bankruptcy notice here was correctly premised upon and issued by the JC for execution against the JD to recover the debt owed by the JD. (para 23)

Case(s) referred to:

Bozson v. Altrincham Urban District Council [1903] 1 KB 547 (*refd*)

Haron Mohd Zaid v. Central Securities (Holdings) Bhd [1982] CLJ 293; [1982] CLJ (Rep) 26 PC (*refd*)

Khoo Kay Hoe v. Chor Phaik Har and Another Appeal [2002] 1 CLJ 317 FC (*refd*)

Re Riddell exp Earl of Strathmore [1888] 20 QBD 512 (*refd*)

Re Tan Ah Poi, Ex P Multi-Purpose Finance Bhd [1999] 2 CLJ 694 HC (*refd*)

Tan Peng Hock v. Ambank (M) Berhad [2011] 1 LNS 1762 CA (*refd*)

Tee Than Song Construction Company Ltd v. Kwong Kum Sun Chan Glass Merchant [1967] 1 LNS 191 FC (*refd*)

Wee Chow Yong, Ex P; Public Finance Bhd [1990] 1 CLJ 176; [1990] 3 CLJ (Rep) 349 HC (*refd*)

Legislation referred to:

Bankruptcy Act 1967, s. 3(1)(i)

Rules of Court 2012, O. 14 rr. 1(1), 3(1)

For the appellant - M/s Lam & Partners

For the respondent - Junnie Neoh (Agnes Chew with her); M/s Zaid Ibrahim & Co

Reported by Najib Tamby

JUDGMENT

Wong Teck Meng JC:

Introduction

[1] This is an appeal against the decision of the Senior Assistant Registrar given on 27 August 2014 dismissing the summons in chambers dated 27 August 2014 applied for by the judgment debtor.

[2] In the said application the judgment debtor applied for the bankruptcy notice dated 15 July 2013 to be set aside. The main ground proffered in the application is that the bankruptcy notice that was filed by the judgement creditor is defective and wrong in law for failure to exhibit a judgment that is recorded against the judgment debtor.

- A [3] The said summons in chambers was supported by the affidavit of Dziyauddin bin Baharom affirmed on 19 May 2014. An affidavit in reply of Ong Chong Hui affirmed on 9 June 2014 on behalf of the judgment creditor was filed.
- B [4] It is not disputed that the request for issue of bankruptcy notice dated 15 July 2013 was based on a failed order of the High Court dated 14 June 2013 allowing the plaintiff to enter summary judgment under O. 14 of the Rules of Court 2012 be entered against the defendants.
- C [5] In addition, the amount stated in the bankruptcy notice which was based on the said order for summary judgment is not disputed by the judgment debtor. On appeal, the only issue raised was whether the summary judgment order where leave was given for the plaintiff to enter summary judgment against the defendant is final judgment against the judgment and is enforceable by the judgement creditor.
- D [6] The judgment debtor submits that the summary judgement order is not a final order but merely an order giving leave to the plaintiff to enter summary judgment against the judgment debtor and as such the request for issue of bankruptcy notice which relied on the summary judgment order and the issuance of the bankruptcy notice is defective and not in order and has to be set aside by the court.
- E [7] The judgment debtor made reference to s. 3(1)(i) of the Bankruptcy Act 1967 and the cases of *Wee Chow Yong, Ex P; Public Finance Bhd* [1990] 1 CLJ 176; [1990] 3 CLJ (Rep) 349; [1989] 3 MLRH 59 where Edgar Joseph J (as he then was) held:
- F Next I shall refer to the following passages in the judgment of Bowen LJ where the point is made even more emphatically at p. 759, para 4:
- With regard to the construction of subsection 1(g) of s. 4, I also agree that in order to entitle a creditor to issue a bankruptcy notice, he must in be a position to issue execution on his judgment at the
- G time when he issues the bankruptcy notice.
- and *Tan Peng Hock v. Ambank (M) Berhad* [2011] 1 LNS 1762; [2012] 5 MLRA 326 where the Court of Appeal held that:
- H ... In our view the critical issue which the court has to decide on when such a challenge is made is whether the creditor who has issued out the bankruptcy notice is a creditor who has obtained a final judgment or order within the meaning of that section, in that, he is a creditor who has obtained a final judgment against the debtor and “execution thereon not having been stayed” and the creditor is a “person who is for the time being entitled to enforce” the final judgment on which the bankruptcy
- I notice is based because by the very words used in s. (3)(1)(i) itself, if for some reason the judgment has been stayed or the creditor cannot for the

time being enforce that judgment, then the proviso to s 3(1)(i) states that he is not a creditor who has obtained a final judgment within the meaning of that section.

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In other words, if the person is not for the time being entitled to enforce a final judgment, then he is not a creditor who has obtained a final judgment or order within the meaning of s. 3(1)(i) and cannot commence bankruptcy proceedings on that judgment.

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[8] Hence, basing on the ruling in these cases, the judgment debtor opined that the judgment creditor is not a creditor envisaged under s. 3(1)(i) of the Bankruptcy Act 1967 in view of the unenforceability of the summary judgment order, thus the judgment creditor had not right to commence bankruptcy proceeding against the judgment debtor.

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[9] The judgment creditor submits that the bankruptcy notice can be premised upon the final summary judgment order as it falls within the ambit of s. 3(1)(i) of the Bankruptcy Act 1967 which reads:

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(i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice.

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[10] Furthermore, the summary judgment order was obtained when the order was pronounced by the court and it became final when the appellant/judgment debtor did not file an appeal against the said order.

[11] The judgment creditor in addition submits that the summary judgment order clearly states the sum owing to the respondent/judgment creditor and the appellant/judgment debtor can find no ambiguity in the summary judgment order.

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[12] Reference was made to the case of *Re Tan Ah Poi, Ex P Multi-Purpose Finance Bhd* [1999] 2 CLJ 694; [1999] 2 MLJ 555 where Abdul Malik Ishak J (as he then was) held that:

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A final judgment determines the principal matter in question. A final judgment puts an end to the whole action by declaring that the plaintiff is the undisputed winner.

[13] Hence, the judgment creditor opines that the summary judgment order is a final order which the bankruptcy notice is premised upon since it has determined the principal matter in question-which is that the appellant/judgment debtor is owing to the respondent/judgment creditor the sum as stated in the summary judgment order and therefore put an end to the whole action, especially when there is no stay of execution and no appeal by the judgment debtor.

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A Findings

[14] First, the submission by the judgment debtor that the summary judgment order is an order giving leave to the plaintiff to enter summary judgment against the judgment debtor is incorrect in law as O. 14 r. 1(1) of the Rules of Court 2012 talks about “the plaintiff may on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or ... thereof except as to the amount of any damages claimed, apply to the court for judgment against the defendant”.

[15] By O. 14 r. 3(1), “the court may give such judgment for the plaintiff against that defendant on the claim ...” means that the summary judgment order reflects the order for judgment given by the court against the defendant and not leave to enter summary judgment against the defendant. Hence, the summary judgment order is a judgment in itself even though it is framed as an order and not as a judgment in form.

[16] Be that as it may, the summary judgment order comes within the ambit of a final judgment or final order as envisaged under s. 3(1)(i) of the Bankruptcy Act 1967 as it is a judgment that determines the principle matter in question that is the debt owing by the judgment debtor to the judgment creditor for a liquidated sum and that the judgment puts an end to the whole action by declaring the judgment creditor as the undisputed winner per *Re Tan Ah Poi, Ex P Multi-Purpose Finance Bhd (supra)*.

[17] In addition, the test to be used to determine whether a judgment or order is final order is laid out succinctly in *Bozson v. Altrincham Urban District Council* [1903] 1 KB 547, by Lord Alverstone CJ as follows:

... it seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? It does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion an interlocutory order.

[18] *Bozson's* test is the preferred test used by the courts here as entrenched in the Federal Court's case of *Tee Than Song Construction Company Ltd v. Kwong Kum Sun Glass Merchant* [1967] 1 LNS 191; [1967] 2 MLJ 205 and the Privy Council case of *Haron Mohd Zaid v. Central Securities (Holdings) Bhd* [1982] CLJ 293; [1982] CLJ (Rep) 26; [1982] 2 MLJ 94. The *Re Tan Ah Poi's* case (*supra*) also followed the *Bozson's* test but stated differently in its own words.

[19] In the summary judgment order, there is nothing left to be disposed off or pending disposal to classify it as an interlocutory order as the said order had finally disposed off the rights of the parties between the judgment creditor and the judgment debtor on merits at the hearing of the application for summary judgment.

[20] The *dicta* of Lord Esher MR in *Re Riddel exp Earl of Strathmore* [1888] 20 QBD 512 at p. 516, “in my opinion, ‘a final judgment’ means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined ...” further supports my view that the summary judgment order is a final judgment or order.

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[21] To digress a bit, even an allocator for costs has been held as a final order within the meaning of s. 3(1)(i) of the Bankruptcy Act 1967 and that a bankruptcy notice founded on it is a valid notice as per the Federal Court’s decision of *Khoo Kay Hoe v. Chor Phaik Har and Another Appeal* [2002] 1 CLJ 317. Other examples of final judgment or orders are also given in *Re Tan Ah Poi, Ex P Multi-Purpose Finance Bhd (supra)*, such as:

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- (1) a point of law determined by the court on a case stated by an arbitrator (*Shubbrook v. Tufnell* [1882] 9 QBD 621, CA);
- (2) an order dismissing an originating summons after the trial of the issues would be similar as an order dismissing an action (*Re Fawsitt, Galland v. Burton* (1885) 30 Ch D 231, CA);
- (3) a foreclosure order made absolute (*Smith v. Davies* (1886) 31 Ch D 595, CA);
- (4) a consent order made in chambers dismissing an action with costs to be paid by the plaintiff (*Shaw v. Hertfordshire County Council* [1899] 2 QB 282, CA);
- (5) an order dismissing the originating summons for the delivery of a bill of costs by a solicitor for taxation purposes (*Re Herbert Reeves & Co* [1902] 1 Ch 29, CA);
- (6) an order dismissing an action at the trial of a preliminary issue of liability (*Bozson v. Altrincham Urban District Council* [1903] 1 KB 547, CA);
- (7) an application for costs out of the legal aid fund that was dismissed (*Hanning v. Maitland* [1969] 3 All ER 1558; [1969] 1 WLR 1885, CA); and
- (8) a declaration sought by the plaintiff that was refused by the court (*Gladys Sarah Becker v. City of Marion Corp & Anor* [1977] AC 271, PC).

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[22] Hence, in comparison with an allocator order and the other various orders stated above, it is my considered view that the strength of the summary judgment order as a final judgment or order is conclusive and beyond dispute, as there is finality in the said order which sets out clearly the exact amount owed by the appellant/judgment debtor to the respondent/judgment creditor which the bankruptcy notice was premised upon.

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A [23] Having said that the summary judgment order is a final judgment or order, coming within the ambit of s. 3(1)(i) of the Bankruptcy Act 1967 and there being no stay of execution of the judgment or order, the bankruptcy notice here was correctly premised upon and issued by the respondent/judgment creditor for execution against the appellant/judgment debtor to recover the debt owed by the appellant/judgment debtor.

B [24] Thus, I agree with the submissions of the respondent/judgment creditor that the summary judgment order is a final judgment or order and in the result, I dismissed the appeal of the appellant/judgment debtor with costs of RM3,000.

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